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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. ...1169

CHARLES E. KIRKLAND and EDDIE ALLEN HOUSTON,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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CHARLES E. KIRKLAND and EDDIE ALLEN HOUSTON,
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Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

OPINION BELOW.

The opinion of the Supreme Court of Tennessee is unreported but printed in Appendix A to this Brief.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The respondent is dissatisfied with the presentation of questions by the petitioners and, pursuant to Rule 40 (3) of the Supreme Court Rules, presents the questions involved as follows:

I. Under the circumstances of this case, was the search of the petitioners and their automobile valid as being incidental to a lawful arrest?

II. Were the petitioners' Fifth Amendment rights against self-incrimination violated by comments of the prosecuting attorney to the effect that certain evidence is "undenied"?

III. Was the indictment upon which the petitioners were convicted insufficient to comply with the requirement of due process?

STATEMENT OF THE CASE.

The respondent accepts the petitioners' statement of the case with the exception of that portion describing the arrest of the petitioner, Houston, and the subsequent search by the officers. Concerning this matter, the respondent submits that the circumstances are more accurately stated as follows:

Prior to the arrest of Houston on April 27, 1966, Ott White, Deputy Sheriff of Bradley County, Tennessee, had received information that Houston had committed a felony (B.E. p. 128, lines 4-7). The Sheriff had notified Deputy White of this information and had issued a "pickup" on Houston (B.E. p. 86, line 11; p. 87, lines 21-25; p. 88, lines 2-3).

As Deputy White was proceeding along Highway 411 in Polk County, Tennessee, he observed Houston's automobile. He stopped the vehicle, at which time Houston got out of the car (B.E. pp. 122-123). Upon Deputy White's inquiry, it was discovered that Houston possessed neither a driver's license nor the registration for the automobile (B.E. p. 123). He was then charged with driving without a driver's license (B.E. p. 122). At this time, Houston's person was searched and he was placed in a squad car.

Shortly thereafter, several other police officers, as well as a security officer of the Southern Bell Telephone and Telegraph Company, arrived at the scene of the arrest (B.E. p. 129). At this time, upon the Deputy's request, Houston departed from the squad car and revealed the contents of his pockets. Included in the contents were two keys which were thereafter identified as fitting the housing of the telephone in the booth which had been burglarized (B.E. p. 99).

The police officers and the security officers from the telephone company then proceeded to search the automobile of Houston. This search revealed a "lock pick", subsequently identified to be an instrument employed in the picking of telephone locks (B.E. pp. 99, 101).

The remainder of the petitioners' statement of the case is accepted by the respondent.

ARGUMENT.

The first contention presented by the petitioners is that they were convicted upon evidence obtained as a result of an unlawful search and seizure. It is argued that since, at the time of arrest, the petitioner Houston was charged with driving without a driver's license, the officers were precluded from searching Houston's person and his automobile for evidence of a felony. The respondent's position is that Houston was arrested primarily upon information that he had committed a felony, and, therefore, the subsequent search of Houston and his automobile at the scene of the arrest was proper as an incident to a lawful arrest.

Relevant to the search, this case presents no question of law which would merit the granting of a writ of certiorari. The pertinent law is not in dispute. Although without a warrant, police officers may arrest a person when they have probable cause for believing such person has committed a felony. Following or contemporaneous with such an arrest, the officers may conduct a valid search of the person and the property within his immediate control, notwithstanding the lack of a search warrant. **Draper v. United States**, 79 S.Ct. 329, 358 U.S. 307, 3 L.Ed.2d 327 (...); **McCray v. State of Illinois**, 87 S.Ct. 1056, 386 U.S. 300, 18 L.Ed.2d 62, reh. denied 87 S.Ct. 1474, 386 U.S. 1042, 18 L.Ed.2d 616.

The insistence of the petitioners presents nothing more than a factual question, i.e., whether or not the Tennessee Supreme Court and the trial court were correct in holding that the search of Houston and his automobile was valid as an incident to his lawful arrest. The respondent respectfully contends that this factual determination by the courts of Tennessee is indubiously sustained by the evidence adduced at the petitioners' trial.

Deputy Ott White, the arresting officer, testified that, prior to the arrest, he had received information that a felony had been committed by Houston (B.E. p. 128, lines 4-7). Moreover, the testimony revealed that the Sheriff had notified Deputy White of this information and had issued a "pickup" on Houston (B.E. p. 86, line 11; p. 87, lines 21-25; p. 88, lines 2-3). In view of this testimony, the only conclusion which can be reached is that the charge of "no driver's license" was made only incidental to the main purpose of the arrest, specifically, probable cause for believing Houston to be guilty of a felony. This is sustained by Deputy White's statement that Houston was arrested for other reasons than the mere fact that he possessed no driver's license (B.E. p. 124, lines 10-12).

Unable to find authority inconsonant with the Tennessee Supreme Court's disposition of the question under consideration, the petitioners have resorted to this Court's opinion in **Preston v. United States,** 84 S.Ct. 881, 376 U.S. 364, 11 L.Ed. 2d 777 (1964). The Preston case is clearly distinguishable from the case *sub judice.* In that case, this Court struck down a search which was made of the defendant's automobile. The defendant had been arrested and his car had been driven to the police station, where it was towed to a garage. The search was conducted while the car was in the garage. The basis of this Court's holding was that the search was **too remote in time and place** to be regarded as incidental to the defendant's arrest. Explicitly defining its holding in the **Preston** case, this Court declared:

> "We think that the search was **too remote in time or place** to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the

evidence obtained as a result of the search inadmissible." (Emphasis added.)

In the case at bar, the search was conducted at the scene of the arrest and shortly following Houston's arrest. Thus, the apparent distinction is seen without difficulty.

Counsel for the petitioners makes reference to the transcript of a preliminary hearing on the no driver's license charge held on May 21, 1966 (Referred to by the petitioners as ST10). With deference to opposing counsel, the respondent submits that this transcript should not be considered by this Court, inasmuch as it was not part of the evidence considered by the trial court or the Tennessee Supreme Court. Although the transcript had been authenticated by the trial judge, the authentication is dated on "11-9-66". Since the present trial did not commence until November 27, 1966, it is clear that the authentication of the transcript as an exhibit was not made pursuant to this case.

II.

The next assertion made on behalf of the petitioners is that the prosecuting attorney, in his closing argument, commented on the petitioners' failure to testify in their own behalf. The record will reflect that this contention is totally without merit and that the comments of the prosecuting attorney were not in violation of the petitioners' constitutional rights.

Indicative of the comments which are assailed are remarks such as, "Now, what explanation do they have of that?" and, "That's all undenied" (B.E. p. 186). Certainly, these comments did not transgress the petitioners' constitutional rights. Remarks of this nature have frequently been declared proper. The overwhelming weight of authority, including that in Tennessee, supports the

rule that it is not improper for the prosecuting attorney to comment that certain evidence is "uncontradicted" or "undenied". **Schweiser v. State**, ... Tenn. ..., 399 S.W. 2d 743 (1966); **Hays v. State**, 159 Tenn. 388, 19 S.W.2d 313 (1929); **Peebles v. United States** (C.A. Miss., 1965), 341 F.2d 60, cert. denied 85 S.Ct. 1362, 380 U.S. 988, 14 L.Ed.2d 280; **Davis v. United States** (C.A. N.C., 1960), 279 F.2d 127, cert. denied 81 S.Ct. 60, 344 U.S. 822, 5 L.Ed.2d 53; **Garcia v. United States** (C.A. Tex., 1963), 315 F.2d 133, cert. denied 84 S.Ct. 117, 375 U.S. 855, 11 L.Ed.2d 82; **Baker v. United States** (C.A. Ark., 1941), 115 F.2d 533, cert. denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, reh. denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, reh. denied 65 S.Ct. 1399, 325 U.S. 895, 89 L.Ed. 2005.

An attempt has been made by the petitioners to escape the application of the rule announced above by insisting that the State's evidence could not have been explained or denied except by the petitioners' testimony. This contention is untenable. The defense could have easily produced other witnesses to contradict, explain, or refute the State's evidence.

III.

Finally, it is urged that the petitioners were denied due process of law because of the insufficiency of the indictment upon which they were convicted. Specifically, it is argued that the indictment did not sufficiently describe the premises which were burglarized.

A perusal of the indictment, in view of the Tennessee statute involved, clearly reflects the lack of merit in the petitioners' position. The indictment charged the petitioners as follows:

> ". . . Charles E. Kirkland and Eddie Allen Houston heretofore, to-wit, on the 27th day of April, 1966,

in the County aforesaid, unlawfully, feloniously and forcibly did break and enter into a certain house in the nighttime, to-wit: the business house of Southern Bell Telephone and Telegraph Company, a corp., with intent of them the said Charles E. Kirkland and Eddie Allen Houston aforesaid to commit a felony, to-wit: larceny, by taking, stealing, and carrying away the goods and chattels then and there being in said house aforesaid and to convert the same to their true owner thereof, against the peace and dignity of the State" (T.R. 2).

The language of the indictment basically followed the wording of pertinent Tennessee statute, Section 39-904 of **Tennessee Code Annotated**, which defines Third Degree Burglary as follows:

"Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than dwellinghouse, with the intent to commit a felony. Every person convicted of this crime shall be imprisoned in the penitentiary for not less than three (3) years nor more than ten (10) years.

"Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by any means, shall be punished by imprisonment for a term of not less than three (3) nor more than twenty-one (21) years."

It is thus apparent that the indictment was sufficient to provide the petitioners with adequate notice that they were charged with the violation of the above-quoted statute. Hence, the fundamental requirement as to the sufficiency of indictment, was satisfied.

CONCLUSION.

The respondent respectfully submits that the petition presents no question which would merit this Court's review upon writ of certiorari. The contentions of the petitioners, after assiduous judicial consideration, have been rejected by the Supreme Court of Tennessee. That Court's opinion, which is annexed as Appendix A to this Brief, is sound in its reasoning and application of the law.

Based on the foregoing, the respondent recommends that the petition for a writ of certiorari be denied.

Respectfully submitted,

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State of Tennessee.

Of Counsel:

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

APPENDIX.

APPENDIX

APPENDIX A.

Nov. 17, 1967.

Charles E. Kirkland and Eddie Allen Houston,
Plaintiffs in Error,
vs.
State of Tennessee,
Defendant in Error.
} Bradley Criminal.

Honorable James C. Witt, Judge.

For Plaintiffs in Error: Harold E. Brown, Chattanooga, Tennessee;

For Defendant in Error: George W. McHenry, Jr., Assistant Attorney General, Nashville, Tennessee, Tom J. Taylor, District Attorney General, Athens, Tennessee.

Opinion.

This appeal comes from the Criminal Court of Bradley County. The parties will be referred to as they appeared in the lower court; that is, plaintiffs in error Kirkland and Houston as the defendants, and defendant in error as the State.

On November 28, 1966, the defendants were convicted, on pleas of not guilty, of burglary in the third degree. The punishment of each defendant was fixed by the jury at ten years in the State Penitentiary. These indictments grew out of an investigation into a series of thefts from telephone booths. The investigation had been carried on by the security department of Southern Bell Telephone & Telegraph Company, the Tennessee Bureau of Investigation, the Bradley County Sheriff's Office, and the Cleveland, Tennessee Police Department.

On April 28, 1966, the defendants were observed, by an officer of the Cleveland Police Department and a security investigator for Southern Bell, carrying on some surreptitious activity in and about a pay telephone booth. Upon investigation, it was found that the telephone had been tampered with and its coin box was missing. No arrest was made at that time. Similar observations were made on two other occasions, at other locations; but, on these latter occasions, the activity was conducted by defendant Kirkland and two other men, unaccompanied by defendant Houston.

Demonstrative evidence introduced at the trial included a set of keys, one of which fit the telephone which had been tampered with, and a "lock pick", an instrument employed in the picking of telephone locks. Both the keys and the "lock pick" were recovered from defendant Houston the day following the break-ins.

A number of assignments of error have been filed. However, the contentions made will be dealt with primarily by subject.

The validity of the indictment is questioned by two assignments of error. It is first argued that the trial court should have granted a motion to quash the indictment because the description of the property broken into was too vague to apprise the defendant of the charge against him. That description was that the defendant did ". . . break and enter into a certain house in the nighttime, to-wit: the business house of Southern Bell Telephone & Telegraph Company, a corporation . . ." This contention has no merit whatever.

It is also contended that the indictment contains a fatal variance, in that it shows the date of the offense as being April 27, 1966, when the State's proof showed that the offense was committed on April 28, 1966. It is settled beyond room for cavil in Tennessee that when

time of commission of a crime is not of its essence, the fundamental test of validity of an indictment is whether or not the defendant received adequate notice of the crime of which he was charged. See **State v. Yates** (1965), 217 Tenn. 160, 395 S.W.2d 813; **Green v. State** (1940), 176 Tenn. 449, 143 S.W.2d 713; both opinions discussing the significance, or lack of it, of disparity between the time alleged in an indictment and that shown by the evidence. Applying the test, as discussed in these cases, we cannot conceive of any way in which these defendants could have been prejudicially misled. The indictment in this case was not defective in either aspect.

By assignment of error No. 2, counsel for the defendants complains of multiple instances where the trial judge made rulings in the process of trial. Any discussion of these, seriatim, would unduly prolong this opinion. Nonetheless, this Court has examined all of the instances mentioned, wherein the defendants say a mistrial should have been granted. None of such instances are of sufficient magnitude to justify the action defendants insist upon. After considering all that counsel has to say on this subject, a close study of the bill of exceptions makes it clear to this Court that the trial judge conducted a fair trial. The substance of these allegedly prejudicial acts and statements were fairly and accurately acted upon by the trial judge. This was a bitterly contested trial, and the zeal of both the defendants' counsel and the Attorney General made it necessary for the trial judge to intervene, from time to time, in the interest of orderly proceedings. The record shows that all of his actions were predicated on insuring that the defendants received a fair trial, and that the jury received only competent evidence. Experience has taught us that the criminal arena is repeatedly more productive of heat than of light.

The defendants rather vehemently argue that it was error to allow a witness to testify for the State who was

not named on the indictment. They rely upon T.C.A., §40-2407, as authority. That statute directs the Attorney General to endorse on the indictment the names of the witnesses he intends to summon. In interpreting this statute, this Court has held, in **Douglass v. State** (1964), 213 Tenn. 643, 378 S.W.2d 749, that the prosecution is not limited by that statute, at the trial, to only those witnesses whose names appear on the indictment.

Under assignment of error No. 9, defendants only argue that which is part and parcel of the subject matter just discussed. Such assignment needs no singular discussion.

There is no basis for the defendants' assertion in the assignments of error that the court should have directed a verdict because of material defects in the State's proof. The practice of direction of verdict is not applicable to proceedings at criminal law. See Caruthers History of a Lawsuit (8th Ed.), 963, § 363, and the cases there cited.

By assignment No. 8, the defendants say that the trial court erred in denying defendants' counsel use of a transcript of the testimony at the preliminary hearing, to examine the State's witnesses as to prior inconsistent statements. The record shows that the Court's action, in this regard, was both fair and proper. The trial court did not exclude counsel's use of transcript to show prior inconsistent statements, other than to the extent that such resulted from his exclusion of statements therefrom otherwise inadmissible as evidence.

One of the defendants' principal arguments is that the trial judge erred in permitting the Attorney General, in his closing argument to the jury, to comment "upon the defendants' failure to take the stand in their own behalf." What occurred was that the Attorney General did remark, more than once, to the effect: "Now, what explanation do they have of it?" and "That's all undenied." Here, the prosecutor is commenting on the failure of the defense to

explain or rebut certain facts. This is not comment on failure of the defendants, themselves, to testify, or the equivalent thereof. The Court has held in **Schweiser v. State** (1966), ... Tenn. ..., 399 S.W.2d 743, that arguments by counsel for the State to the effect that the State's evidence is "uncontradicted" were not erroneous as drawing the attention of the jury to the failure of the defendants to testify. We see no difference between the terms "uncontradicted" and "undenied." See also **Hays v. State** (1929), 159 Tenn. 388, 19 S.W.2d 313, where the reasons for these conclusions are lucidly stated.

The contention which has given us most concern is that which insists that the introduction of the demonstrative evidence was error because it was obtained by an illegal search and seizure. The keys and the "lock-pick" mentioned heretofore were taken from the defendant Houston the day following the burglary for which defendants are on trial. The facts of this occurrence are that defendant Houston, while driving his automobile, was apprehended by a Deputy Sheriff. This Deputy asked Houston for his automobile registration and his driver's license. When Houston could not produce either, the Deputy placed him under arrest for "No Driver's License." At this point, Houston got out of the car, was searched by the Deputy for a weapon, and placed in the patrol car. Some time later, the Sheriff and a TBI Agent arrived and searched the defendant's person again. These two also searched Houston's car. It was this latter search of Houston's person and his car which produced the keys and the "lock-pick."

From the record it appears that the Deputy apprehended the defendant with reasonable ground to believe that Houston was one of the suspected persons in the telephone burglaries. He had been given information of the burglaries and a description of Houston and his car.

The defendants' position is that the arrest of Houston for not having a driver's license was a mere subterfuge for stopping him, searching his person and his car. For authority that such arrest and search were thus illegal, defendants rely on **Murphy v. State** (1953), 194 Tenn. 698, 254 S.W.2d 979. The situation at bar, however, is factually different from that before the Court in the case cited. In that case, the defendant was stopped by the Highway Patrol, requested to present his driver's license for identification, and was then held by one of the officers, while the other went to get a search warrant. This action was motivated only by suspicion that Murphy might be illegally transporting whiskey; that is, suspicion generated by Murphy's reputation in this regard. This Court there held that the arrest was illegal and the evidence obtained by the subsequent search therefore was also illegal and inadmissible. The search in that case was of a purely exploratory nature. Certainly, that was not a case, as is the present one, in which the arresting officer, at the time the arrest was made, had been authoritatively informed of the commission of a felony and that the defendant was one of the perpetrators. In addition, in the case now before the Court, the Deputy legally arrested the defendant Houston for not having a driver's license. It is true that at the same time, he had sufficient justification to arrest for burglary. The search was not made in connection with lack of driver's license. It was made in connection with the arrest for burglary, upon the arrival of the Sheriff.

It is our conclusion that the search of Houston and the search of his automobile was incident to a lawful arrest. It follows that the evidence procured by this search was legal and admissible at the trial.

It is complained, as to the defendant Kirkland, that the proceeds of the search should not have been admitted as

to him. It is sufficient to say that this was not the evidence offered to implicate Kirkland. There was ample other evidence which implicated him as a confederate of Houston in the connection of the crime.

After a lengthy consideration of this case, we find no merit in any of the assignments of error. Judgment of the trial court is affirmed, with costs of this appeal assessed against the plaintiffs in error.

/s/ Larry Creson,
Larry Creson,
Justice.

Burnett, C. J.,
Dyer, Chattin and
Humphreys, JJ., concur.